Laborers International Union of North America, AFL–CIO *and* Eshbach Brothers, LP *and* International Union of Operating Engineers, AFL–CIO Local 542. Case 4–CD–1129–1

January 28, 2005

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

DECISION AND DETERMINATION OF DISPUTE

The underlying charge in this Section 10(k) proceeding was filed on October 24, 2003,[1] by Eshbach Brothers, LP (the Employer) alleging that Laborers International Union of North America, AFL–CIO (Laborers) violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 542 (Operating Engineers). The hearing was held on August 12, 2004, before Hearing Officer Harold A. Maier.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer is a Pennsylvania limited partnership that operates as a masonry contractor with a principal place of business in Reading, Pennsylvania. During the 12-month period prior to the hearing, the Employer purchased and received goods valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a contractor performing masonry work in eastern Pennsylvania. The Employer is signatory to collective-bargaining agreements with Laborers.

Since the 1960's, the Employer has been a member of Employing Bricklayers Association (EBA), which is made up of masonry contractors working in the five-county area around Philadelphia, Pennsylvania.[2] The EBA has collective-bargaining agreements with Operating Engineers, Laborers, and Bricklayers. By a letter dated January 22, 1983, the Employer withdrew its authorization for the EBA to represent the Employer in collective bargaining with Operating Engineers. By letter dated February 7, 1983, Operating Engineers acknowledged receipt of the Employer's January 22 letter and stated its desire to negotiate a new collective-bargaining agreement with the Employer. However, no such negotiations ever took place.

In October 2002, the Employer began work on a masonry project at Central Bucks High School in Bucks County, Pennsylvania. The Employer assigned the operation of the rough terrain forklifts (Pettibones) at this project to employees represented by Laborers.

On June 2, Robert Schmitt, a business agent for Operating Engineers, approached the Employer's assistant foreman, Peter Munhall, at the Central Bucks High School jobsite and stated that "operating the Pettibones was [Operating Engineers'] work and that something was going to come of it," and that "it wasn't going away." Operating Engineers picketed the jobsite the following 2 days, temporarily closing the jobsite. The Employer filed unfair labor practice charges over the picketing, but the charges were dismissed because of the short duration of the picketing and because Operating Engineers' signs only protested the Employer's wages and nonadherence to area standards.

By letter dated June 25, Operating Engineers informed the Employer that it was filing a grievance over the Employer's failure to employ employees represented by Operating Engineers on its Pettibone forklifts. Operating Engineers asserted that the Employer's conduct violated its collective-bargaining agreement with the EBA, to which it asserted the Employer was a party, and sought double damages as a pay-in-lieu remedy. Thereafter, in an August 21 letter to the Employer, Laborers claimed that employees it represents should operate the Employer's Pettibone forklifts at the jobsite.

Pursuant to Operating Engineers' grievance, an arbitration hearing was held on October 21. The Employer refused to participate in the arbitration, because it was not a signatory to the collective-bargaining agreement between the EBA and Operating Engineers. On November 20, the arbitrator found that the Employer was bound by the EBA's collective-bargaining agreement with Operating Engineers, and awarded the contractual double damages to Operating Engineers.

[1] Unless otherwise indicated, all dates are in 2003.

[2] The five-county area consists of Bucks, Chester, Delaware, Montgomery and Philadelphia counties, in Pennsylvania.

By letter to the Employer dated October 22, Laborers stated it will take "all necessary steps to protect its jurisdiction and assignment of work in this area, including establishing a picket line in the event your company reassigns this work to another craft." On October 24, the Employer filed the instant charge alleging that Laborers violated Section 8(b)(4)(D) of the Act.

B. Work in Dispute

The work in dispute is the operation of Pettibone forklifts on the masonry project at Central Bucks High School, in Bucks County, Pennsylvania.

C. Contentions of the Parties

The Employer and Laborers contend that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated, and that no voluntary means exist for adjustment of the jurisdictional dispute. In addition, the Employer and Laborers argue that the work in dispute should be assigned to the employees represented by Laborers based on the factors of: collective-bargaining agreements; employer preference and past practice; area and industry practice; skills and training; and economy and efficiency of operations.

Operating Engineers contends that the notice of hearing should be quashed because there are no competing claims for the work in dispute, and because there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. Operating Engineers argues that it has not claimed the work, and has only sought to enforce its contractual remedies under its collective-bargaining agreement with the Employer. Operating Engineers further argues that the threat by Laborers was a sham and a product of collusion between the Employer and Laborers. Finally, Operating Engineers argues that a collective-bargaining agreement between Operating Engineers and the EBA provides an agreed-upon method to resolve the dispute over the work assignment. Alternatively, Operating Engineers contends that if the notice of hearing is not quashed, employees represented by Operating Engineers should be awarded the disputed work based on the factors of: collective-bargaining agreements; area and industry practice; skill and training; and economy and efficiency of operations.

D. Applicability of the Statute

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.[3]

We find that there are competing claims for the work. Laborers has at all times claimed the work in dispute, and Operating Engineers, despite its contention to the contrary, has also claimed the work by virtue of its filing of a pay-in-lieu grievance over the Employer's assignment of the work to Laborers. See *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998) (filing of pay-in-lieu grievance constitutes a claim for work in dispute).[4]

We also find that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. As described above, by its October 22 letter to the Employer, Laborers threatened to take certain action, including picketing, if the work in dispute was reassigned to employees represented by Operating Engineers. Operating Engineers argues that Laborers' threat was a sham and a product of collusion with the Employer. In support, it relies on the timing of the Laborer's letter, i.e., right after the arbitration on Operating Engineers' grievance, and on the lack of evidence that Laborers had any intention of following through with its threat to picket.

Contrary to Operating Engineers' contention, the evidence fails to demonstrate that the threat was either a sham or the product of collusion. Thus, the assistant director of Laborers' Construction Department, Gregory Davis, testified that he drafted both the August 21 and the October 22 letters because Laborers considered the Pettibone forklifts a "tool of the trade," and because Laborers has always claimed "that piece of equipment." Further, an employee of the Employer, Wilson Eshbach, testified without contradiction that there was no collusion between the Employer and Laborers. "In the absence of affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion, the

[3] *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001); *Teamster Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998).

[4] Member Liebman agrees that the evidence here is sufficient to support a finding, consistent with *Laborers Local 113 (Super Excavators I)*, supra that the Operating Engineers have made a claim to the work. See also *Laborers Local 113 (Michels Pipeline Construction*), 338 NLRB 480, 485 (2002) (concurring opinion of Member Liebman). In her view, this case is distinguishable from *Laborers Local 113 (Super Excavators II)*, 338 NLRB 472 (2002), where she dissented. In that case, the Operating Engineers Local 139, which had a collective-bargaining agreement with the employer, filed grievances that did not seek reassignment of the disputed work *or* pay-in-lieu. Rather, the grievances sought "only that the employer pay the employee(s) who actually performs the work at the (higher) rate specified" in the parties' agreement. 338 NLRB at 478–479.

Board will find reasonable cause to believe that the statute has been violated." *Laborers Local 271 (New England Foundation Co.)*, 341 NLRB No. 70, slip op. at 2 (2004).

We further find that there is no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. Specifically, we find no merit to Operating Engineers' contentions that both Operating Engineers and Laborers are required to submit jurisdictional disputes to the "Plan for National Joint Board for Settlement of Jurisdiction Disputes," and that the EBA's collective-bargaining agreement with Operating Engineers requires both parties to present any jurisdictional dispute to that tribunal. "[I]n order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement." *Nickelson Industrial Service*, 342 NLRB No. 95, slip op. at 2 (2004). The Employer is not a party to the EBA agreement because, as noted above, in 1983 it withdrew its authorization for the EBA to negotiate on its behalf. Further, the Employer's collective-bargaining agreement with Laborers does not include any reference to the EBA's collective-bargaining agreement or the "Plan for National Joint Board for Settlement of Jurisdictional Dispute." As the evidence does not establish that the Employer is bound by the EBA agreement, we, therefore, find that there is not an agreed-upon method for voluntary adjustment within the meaning of Section 10(k) of the Act. Accordingly, the dispute is properly before the Board for determination.

E. Merits of the Dispute.

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212* (*Columbia Broadcasting*), 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743* (*J.A. Jones Construction*), 135 NLRB 1402 (1962).

The following factors are relevant in deciding this dispute.

1. Certification and collective-bargaining agreements

There is no record evidence of any applicable Board certifications concerning the employees involved in this dispute.

The Employer presented evidence that it has a collective-bargaining agreement with Laborers. That agreement appears to cover the forklift work in dispute, inasmuch as it states that it covers work that is "historically or traditionally or contractually assigned to and performed by members of the Laborers . . . including, but not limited to, the tending of masons, unloading, mixing and all handling of all materials . . . [c]onveying of such materials by any mode or method; unloading, erecting, moving, adjustment and dismantling of all scaffolds."

Operating Engineers contends that the Employer is bound by a collective-bargaining agreement between the EBA and Operating Engineers that covers ". . . operating . . . of all mechanical equipment used in and about the construction of building . . . including . . . fork lifts . . ." However, as stated above, the record shows that in 1983 the Employer withdrew its authorization for the EBA to bargain on its behalf with Operating Engineers and that no subsequent negotiations took place between the Employer and Operating Engineers. Therefore, we find that the factor of collective-bargaining agreements favors an award to the employees represented by Laborers.

2. Employer preference and past practice

The record shows that the Employer prefers that employees represented by Laborers continue performing the work in dispute. At the hearing, the Employer's chief administrative officer, Kenneth Eshbach, testified that the Employer's past practice is to assign forklift work of the kind in dispute to employees represented by Laborers, and that the Employer prefers to continue employing the employees represented by Laborers. Eshbach further testified that the Employer has employed individuals represented by Laborers since at least 1983, and that the Employer has not employed employees represented by Operating Engineers to perform any work of the kind in dispute. Accordingly, we find that this factor favors an award of the disputed work to employees represented by Laborers.

3. Area and industry practice

At the hearing, Laborers and the Employer presented testimony that the operation of rough terrain forklifts is work traditionally performed by Laborers-represented employees in the five-county area in Pennsylvania. Kenneth Eshbach testified that the Employer has employed employees represented by Laborers to operate the forklifts in projects within this area. Laborers' representative Greg Davis, and Mason Contractors Association representative Mike Adelizzi, testified that the industry practice in the five-county area is for employees represented by Laborers to perform forklift work of the kind in dispute.

Operating Engineers also presented testimony that the disputed work has been performed by members of Operating Engineers at similar projects within the five-county area. Representatives of five masonry contractors who are members of the EBA, testified that they employ em-

ployees represented by Operating Engineers to operate Pettibone forklifts. Because the evidence shows that employees represented by both Operating Engineers and Laborers have performed the disputed work within the five-county area, we find that this factor does not favor an award of the disputed work to either group of employees.

4. Relative skills and training

The Employer and Laborers presented testimony that Laborers' mason tenders are required to obtain specialized training and certification in operating all-terrain forklifts and scaffold building, that they possess the required skills and training to perform the disputed work, and that they have performed this type of work in the past. Adelizzi and Davis testified that employees represented by Laborers receive training in mason tending through a 4-year construction apprenticeship program. Kenneth Eshbach testified that the Employer is satisfied with the quality of the work performed by its Laborers-represented employees.

Operating Engineers contends that its members have the requisite skills needed to perform the disputed work. Operating Engineers' representative, Charles Priscopo, testified that its members must complete 4 years of training and certification before achieving journeyman status. A masonry contractor, Brendon Ward, testified that the employees represented by Operating Engineers are skilled in operating forklifts. On this record, we find that employees represented by both unions have the skills and training necessary to perform the work in question. This factor, therefore, does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Kenneth Eshbach testified that in addition to operating the forklifts, its Laborers-represented employees also perform other work for the Employer at this project, such as mason tending and erection of scaffolding. According to Eshbach, if employees represented by Operating Engineers operated the forklifts, the Employer would still assign the mason tending and the erection of the scaffolding to Laborers-represented employees. Eshbach testified that it is more economical and efficient to have employees represented by Laborers perform the whole project because they are more versatile than employees represented by Operating Engineers.

Operating Engineers contends that the high skill level of employees it represents makes it more efficient to use employees it represents to perform the work in dispute. In support, Operating Engineers presented the testimony of masonry contractors John Giovanazzo and Nick Sabia. Giovanazzo testified that the performance level of employees represented by Operating Engineers is such that it does not make using them less competitive than using Laborers-represented employees. Sabia testified that it is economically beneficial to use Operating Engineers members, because "if the guy's a good operator, . . . he's much quicker, much safer, knows how to maintenance his machine."

We find that, on balance, because the Laborers are performing other work on the project, aside from the disputed work, the factor of economy and efficiency of operations favors an award of the disputed work to those employees.

Conclusions

After considering all the relevant factors, we conclude that the employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by Laborers not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

Scope of Award

The Employer and Laborers request that the Board issue a broad award covering the five-county area consisting of Bucks, Chester, Delaware, Montgomery and Philadelphia counties, Pennsylvania. The Employer and Laborers argue that this is necessary to avoid the recurrence of similar work disputes between Operating Engineers and Laborers.

"The Board customarily declines to grant an areawide award in cases in which the *charged party* represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work." *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). See also *Laborers (Paul H. Schwendener, Inc.)*, 304 NLRB 623, 625 (1991). Because Laborers is the charged party in this case, and because the Employer contemplates continuing to assign this work to employees represented by Laborers, we conclude that the issuance of a broad award would be inappropriate, and we shall limit our determination accordingly.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Eshbach Brothers, LP, represented by Laborers' International Union of North America, AFL–CIO, are entitled to perform the operation of the rough

terrain forklifts necessary for the masonry project at Central Bucks High School construction site located in Bucks County, Pennsylvania.

Dated, Washington, D.C. January 28, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD